

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

3586

FILE:

B-216840

DATE: July 1, 1985

MATTER OF:

Vac-Hyd Corporation

DIGEST:

1. When services being procured are of a critical nature and the agency has only a short timeframe in which to award a new contract, GAO cannot object on any legal basis to an award to the incumbent contractor, the only qualified source, even though the solicitation induced nonapproved sources such as the protester to compete.
2. When an offer from a small business concern is not technically acceptable because, for example, the offeror is not an approved source, the Small Business Act does not apply.
3. Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract if no additional sources become qualified.
4. When a protest is denied GAO will not consider a protester's request for proposal preparation costs.

Vac-Hyd Corporation protests the rejection of its offer under request for proposals (RFP) No. F34601-84-R-44555, issued by Tinker Air Force Base, Oklahoma. The solicitation covered components for repair of fighter aircraft engines. The Air Force rejected Vac-Hyd's proposal because the firm was not an approved source and the agency could not delay the award while Vac-Hyd underwent the qualification process.

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We deny the protest, finding the agency was compelled to make an award to the incumbent contractor, the only qualified source, within a timeframe that precluded qualifying other sources. Nevertheless, we recommend that the Air Force take immediate and vigorous steps to qualify any new nonapproved source that may wish to participate in future competitive procurements. Only if none become qualified should the agency consider exercising the option under the current contract.

BACKGROUND

The RFP provided for a requirements-type contract for the repair and overhaul of TF30 compressor stators, a component of the F-111 fighter aircraft engine. At the time the RFP was issued, only two companies--Chromalloy American Corporation (the incumbent contractor) and the Hamilton Standard Division of United Technologies Corporation--had been approved by the Air Force to do this work. Clause M-48 of the RFP informed potential offerors of this fact and stated that the successful offeror would have to be an approved source in accord with Air Force procedures for the repair and overhaul of critical aircraft engine parts. However, clause M-48 also stated that firms not currently approved might be considered for award if the offeror submitted proof that it (1) had received prior Department of Defense (DoD) approval as a source for the required repair/overhaul work, or (2) had satisfactorily performed this type of work for a DoD agency, or (3) meets or has met the criteria established by the responsible engineering activity concerning qualification for the required repairs. Under this last category, the Air Force also listed "typical criteria." These included:

- "(a) Evidence of satisfactory experience in similar repairs of similar parts.
- "(b) Evidence of satisfactory experience in welding, heat treating or fabricating aircraft engine material for parts of similar complexity.
- "(c) Evidence of satisfactory experience with special finishing and coating techniques.
- "(d) Evidence of satisfactory experience in repairing aircraft engine critical parts for other DoD services or commercial airlines.

"(e) Federal Aviation Administration [FAA] repair or manufacturing source approval."

Since Vac-Hyd, a small business concern, has no prior DoD experience, the firm states that it submitted with its proposal evidence that it has had extensive experience in the repair and overhaul of commercial aircraft stators, that it is certified by the FAA as an approved repair station, and that its facility is fully equipped and its personnel fully trained to perform all the overhaul and repair work required by the RFP. In addition to this, a week before the September 17, 1984, closing date for receipt of proposals, Vac-Hyd hand-delivered this same information to the Office of Contracting and Manufacturing at Tinker Air Force Base. The firm states that it anticipated that this would speed up the source approval process, which it believed required about 3 weeks.

Nevertheless, the contracting officer notified Vac-Hyd by letter dated September 28 that its proposal could not be considered for the award. The contracting officer stated that the procurement was "restricted to already approved sources" and that the Air Force's "current requirements will not permit a delay in award incident to the evaluation and approval of your company as a source on this acquisition."

Upon receipt of this letter, Vac-Hyd filed a protest with the Air Force, requesting that the agency reconsider its decision to exclude Vac-Hyd from the competition. However, the Air Force did not respond to this protest, and it was only when Vac-Hyd officials placed a telephone call to the contracting officer to find out what the Air Force intended to do that Vac-Hyd learned that on September 28, the same day the agency had rejected Vac Hyd's proposal, the agency had awarded Chromalloy a 1-year contract with two 1-year options. Vac-Hyd immediately protested to our Office.

VAC-HYD'S PROTEST

Vac-Hyd's protest has two major grounds. First, Vac-Hyd argues that the Air Force's refusal to evaluate its proposal and to initiate procedures by which it might obtain approved source status disregarded clause M-48 of the solicitation and violated federal procurement policy requiring that the government deal fairly and honestly with all offerors. Second, Vac-Hyd argues that the Air Force violated the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1982), when it failed to refer the question of Vac-Hyd's

ability to perform the overhaul/repair work to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC).

In support of its first ground for protest, Vac-Hyd asserts that the contracting officer had no right to disregard either the approval procedures established by the solicitation or the information Vac-Hyd submitted with its proposal to qualify as an approved source. Vac-Hyd further argues that the Air Force was required to provide a reasonable time for source approval, stating that it prepared its offer under the assumption that the agency had in fact set aside adequate time for this procedure. This assumption was confirmed, in Vac-Hyd's opinion, when the solicitation was amended to provide for an offer acceptance period of 120 days rather than the normal 60 days. The protester concludes that the Air Force effectively restricted the competition to the two previously approved sources and in reality brought about a sole-source award to the only approved source (Chromalloy) competing for the contract. In Vac-Hyd's opinion, then, the Air Force conducted this procurement in direct contradiction to the explicit terms of the RFP and in so doing failed to consider its proposal in a fair and honest manner.

As to its second ground for protest, Vac-Hyd notes that under the Small Business Act and applicable regulations, whenever a contracting agency finds a small business nonresponsible, it is required to refer the matter to the SBA; if the SBA finds the small business responsible and issues a COC, the determination is binding on the agency. In Vac-Hyd's opinion, the Air Force's refusal to evaluate its proposal or to initiate qualification procedures was tantamount to a finding by the agency that the protester lacks the special qualifications to perform the stator overhaul/repair work. According to Vac-Hyd, this was a de facto nonresponsibility determination that should have been referred to the SBA, and the Air Force's failure to make the referral was, therefore, a violation of the Small Business Act.

Vac-Hyd requests that the contract be set aside, that Vac-Hyd be qualified as an approved source, that the requirement be resolicited, and that Vac-Hyd be reimbursed for its original proposal preparation costs.

THE AIR FORCE'S RESPONSE

The Air Force responds that the contracting officer, in her initial evaluation, suspected a mistake in a portion

of Vac-Hyd's proposed prices and also discovered that Vac-Hyd had failed to return the attachments to the RFP along with the rest of the solicitation documents. In the Air Force's opinion, this contradicts Vac-Hyd's assertion that it had submitted a complete proposal that only required the Air Force to proceed with the source approval. According to the Air Force, it would have been necessary to conduct discussions with Vac-Hyd before the agency could have determined whether its proposal was acceptable. However, since Vac-Hyd was not an approved source, no discussions were held and no final determination was ever made regarding the acceptability of the proposal.

As to clause M-48 of the RFP, the Air Force maintains that while it did specify that nonapproved sources might be considered for award, the clause also stated that only an offeror that had been approved in accord with the applicable procedures could ultimately receive the award and that the approval would have to be accomplished within a timeframe that met the government's requirements. According to the agency, it was impossible to evaluate Vac-Hyd in time to satisfy the Air Force's needs--the then-current contract was about to expire and the availability of uninterrupted stator overhaul/repair services was of critical importance.

Regarding the amount of time needed to become an approved source, the Air Force notes that while clause M-48 allows a nonapproved source such as Vac-Hyd to submit evidence of prior commercial stator repair experience to support its request for approved status, the submission of such evidence does not by itself qualify the offeror. The Air Force emphasizes that clause M-48 lists "typical criteria" for approved status, not all the criteria. According to the Air Force, the responsible engineering activity establishes the full criteria that any firm must meet to become an approved source, and this normally includes the offeror demonstrating its ability by performing overhaul/repair work on Air Force-provided TF30 stators--a process which can take from 2 to 6 months, not the 3 weeks Vac-Hyd envisioned. In addition, the Air Force points out that the purpose behind the RFP's 120-day offer acceptance period was to require all offerors to hold their prices while proposals were being evaluated and had nothing to do with providing additional time for source approval.

Finally, as to whether the question of Vac-Hyd's responsibility should have been referred to the SBA, the Air Force argues that it never made a determination concerning Vac-Hyd's responsibility, since Vac-Hyd was not an approved source. Accordingly, the Air Force denies

that it was required to refer the matter to SBA for consideration under the COC program.

Even though it concludes that the Vac-Hyd protest is without merit, the Air Force acknowledges that it could receive the benefit of better prices in future procurements if additional approved sources were available to compete for the stator overhaul/repair work. Consequently, the agency states that it is pressing forward in its effort to qualify both Vac-Hyd and the other nonapproved source that competed under the protested procurement. If one or both become approved sources, the Air Force states that it will issue a new solicitation, rather than exercise the options under the Chromalloy contract.

VAC-HYD'S REBUTTAL

Responding to the agency's protest report, Vac-Hyd argues that the Air Force should not be allowed at this stage to maintain that it was under time constraints that prevented it from holding up the award until new sources were approved. Vac-Hyd notes that the Air Force should have been aware that its old contract was for a 3-year period with a specific expiration date; therefore, the agency should have issued the new solicitation early enough in the last year of the contract to allow sufficient time for new sources to be approved. In Vac-Hyd's opinion, the Air Force should not be allowed to award what is tantamount to a sole-source contract to the incumbent contractor because of the agency's own administrative delays.

Vac-Hyd also alleges that the Air Force has been slow to inform Vac-Hyd what it must do to be approved, and when it told the protester that it would have to repair government-furnished stators for Air Force inspection and evaluation, the agency failed to supply those stators despite a number of requests.

GAO ANALYSIS

It is well established that the government must deal fairly and honestly with all offerors competing for federal contracts. Keco Industries, Inc. v. United States, 492 F. 2d 1200 (Ct. Cl. 1974). It is also well established that the prequalification of offerors, as opposed to the prequalification of products, generally results in an unwarranted restriction on the full and free competition contemplated by the federal procurement statutes. D. Moody & Co., Inc., B-185647, Sept. 1, 1976, 76-2 CPD ¶ 211. Nevertheless, our Office has recognized that, under certain

limited circumstances, the prequalification of offerors may be allowed. See, for example, Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD ¶ 390; Rotair Industries; D. Moody and Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD ¶ 410.

Recent legislation, although not applicable to this procurement, specifically addresses the practice of prequalifying offerors and establishes a framework for future procurements.^{1/} In addition, our Office has

^{1/} Under 41 U.S.C.A. § 253C (West Supp. 1985), as added by section 202 of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and 10 U.S.C.A. § 2319 (West Supp. 1985), as added by section 1216 of the Department of Defense Authorization Act, 1985, Congress has established standards which should aid nonapproved sources such as Vac-Hyd in the future. Both acts contain provisions concerning prequalification, testing, and other quality assurance procedures. They require, among other things, that the qualification be justified and standards specified; that potential offerors be provided an opportunity to demonstrate their ability to meet standards; and that agencies promptly advise offerors whether qualification was attained and, if not, why not. Potential offerors generally may not be denied the opportunity to submit offers and have them considered for award solely because they are not on lists of qualified bidders or manufacturers. Moreover, the Department of Defense Authorization Act states that the opportunity to qualify shall be "on a reimbursable basis," and both acts state that in certain circumstances, the contracting agency must bear the cost of testing and evaluation for small business concerns. However, the acts also provide that the head of an agency need not delay a proposed procurement in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

The pertinent provisions of the Small Business and Federal Procurement Competition Enhancement Act apply to solicitations issued more than 180 days after the date of enactment, which occurred on October 30, 1984. Those of the Department of Defense Authorization Act will become effective 1 year after enactment, i.e., on October 19, 1985, and will apply to all solicitations issued after that date. Thus, neither act applies to the protested procurement.

consistently held that when a contracting agency restricts a contract award to an approved source, nonapproved sources must be given a reasonable opportunity to qualify. See Hill Industries, B-210093 July 6, 1983, 83-2 CPD ¶ 59; 40 Comp. Gen. 348 (1960).

Here, the Air Force is not seeking to procure any particular product or part. Rather, it seeks expert services, and because of the part being serviced--i.e., components for fighter aircraft engines--the Air Force wants to ensure that the company selected has a high level of competence and experience. Under these circumstances, the Air Force has decided that all potential contractors must first be approved before they can be considered for the award and has established specific procedures for this process. Nevertheless, the RFP in this case specifically invited nonapproved sources to submit proposals, provided that they also submitted evidence of prior experience that the Air Force was able to evaluate before award.

This prequalification process clearly serves a bona fide need of the government--that is, it ensures a high level of maintenance on a critical aircraft part--yet it also allows nonapproved sources to submit proposals and become qualified. We therefore see nothing improper under the facts presented with the Air Force's basic approach. See Rotair Industries; D. Moody and Co., Inc., 58 Comp. Gen. 149, supra. We do question, however, the way the Air Force applied this procedure to the protester, since it does not appear that Vac-Hyd was given a reasonable opportunity to become qualified. From the facts presented by the Air Force, the agency was aware at the time it issued the solicitation that its existing contract was about to expire. In addition, it was aware that it could take from 2 to 6 months under its procedures for a nonapproved source to be qualified. Nevertheless, the Air Force issued an RFP that in effect encouraged nonapproved sources like Vac-Hyd to spend time and money preparing proposals that the agency apparently did not intend to consider.

In its protest report, the agency points out that the TF30 stator repair program was synopsized in mid-June 1984 and provided a reference for qualification procedures. Although in theory this means that Vac-Hyd was on constructive notice of the qualification requirement several months before the closing date for receipt of proposals, in reality there is no evidence that even if Vac-Hyd acted more quickly to initiate the qualification

procedures, its proposal would have been treated any differently by the agency. Clearly, if the full 6 months that the Air Force states might be required for qualification actually were required, synopsis in June would not permit a firm to qualify for award in September.

In view of the foregoing, it is clear that the short timeframe the Air Force was forced to work under was due largely to its own lack of planning. As Vac-Hyd has pointed out, the agency should have begun the procurement process early enough to allow adequate time to evaluate any offers submitted by nonapproved sources. Nevertheless, the Air Force did need uninterrupted service for its TF30 compressor stators, and it was in fact under real time constraints. Moreover, on the date of award, Chromalloy was the only approved source available to undertake the overhaul/repair service. Under those circumstances, we cannot object to the award on any legal basis--even though we find that Vac-Hyd's proposal was not treated fairly.

As to whether the Air Force should have referred the question of Vac-Hyd's acceptability to SBA, when an agency makes a finding that an offer from a small business concern is not technically acceptable, because, for example, it is not an approved source, the Small Business Act does not apply. See Pacific Sky Supply, Inc., B-215189 et al., Jan. 18, 1985, 64 Comp. Gen. _____ (1985), 85-1 CPD ¶ 53. That is the case here, since there has been no finding of nonresponsibility.

The protest is denied.

RECOMMENDATION FOR REMEDIAL ACTION

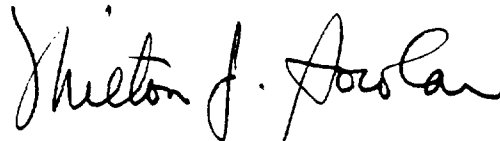
We believe that the Air Force had alternatives to awarding a 1-year contract with 2 option years to the incumbent contractor. For example, when the agency realized that it had received offers from two nonapproved sources but did not have sufficient time to allow them to be qualified, it could have requested Chromalloy to extend its then-current contract long enough to allow the approval process to be completed.

The Air Force advises us that if Vac-Hyd and/or the other nonapproved source that participated in the protested procurement are granted approved status, it intends to resolicit the requirement rather than exercise the option under the Chromalloy contract. We recommend that the Air

Force take immediate and vigorous steps to qualify any new nonapproved source that may wish to participate in a competitive procurement. Only if none become qualified should the Air Force consider exercising the option under the current contract.

By separate letter of today, we are informing the Secretary of the Air Force of our recommendation.

In view of our denial of the protest, we have not considered Vac-Hyd's request for proposal preparation costs. Orvedahl Construction, Inc., B-213408, April 10, 1984, 84-1 CPD ¶ 405.



Acting Comptroller General
of the United States